Settlement Conference Techniques

A Judge's Opening Statement

By Hon. Morton Denlow

A judge's opening statement to the parties sets the tone for a settlement conference. It provides an opportunity to explain the process, discuss the possible advantages of settlement over continued litigation, and give direction to the parties about what they should expect during the conference. For many clients, the settlement conference represents their day in court. Therefore, the judge must convey the goals he or she expects to achieve and the method he or she will use to ensure that each party is given the opportunity to present its case fully and fairly to the other side. This article summarizes the steps that a judge should take to ensure that a case is ripe for settlement and, once that is ascertained, the issues that judge should address in his or her opening statement to facilitate and clarify settlement.

Logistics

The standing order. Before the settlement conference, the judge should issue an order or other written instruction to help the parties prepare for the conference. A standing order is the best practice, and it should be provided to the parties at least thirty days before the conference. This standing order should delineate what the parties are required to do before the conference, who should attend, and what will transpire. The standing order that I send to parties specifically covers the following points:

1. Parties should treat the settlement process seriously because less than 5 percent of civil cases go to trial.
2. Parties must exchange a written itemization of damages and settlement demands and offers before the conference and deliver copies to me no later than five business days before the conference.
3. Persons who have the ultimate authority to settle the matter are directed to attend the settlement conference.
4. Parties receive an explanation of the process.
5. Parties and counsel are advised that statements made at the conference cannot be used in discovery nor can they be entered into the record at trial.
6. Parties receive a list of topics they should be prepared to discuss, such as their objectives in the litigation, the issues requiring resolution, the impediments to settlement, and the possibilities for a creative resolution.
7. Counsel are directed to provide a copy of the standing order to their

Published in The Judges' Journal, Volume 45, Number 2, Spring 2006.

clients and to discuss the issues with them, and

8. Parties are invited to visit my home page on the district court's Web site to read articles discussing effective settlement conferences.

The setting. The settlement conference should be conducted in a place where the parties and the judge can easily speak to one another and have access to a second room for separate caucusing. I use a counsel table in my courtroom for the joint opening session. Parties are seated on opposite sides of this table and I sit at one end. The courtroom conveys an air of seriousness. Yet, because I preside wearing a suit rather than a robe and sit alongside the parties, a more casual and comfortable atmosphere exists so that the parties may participate more easily. My law clerk and law student externs also attend, seated in the jury box. I jokingly inform the parties that a jury is available to decide the case if it is not settled. A little levity helps to break the tension and places the parties more at ease.

When I caucus separately with parties, we retire to my chambers. During this phase, the parties shuttle back and forth between the courtroom and chambers. I usually meet with attorneys and clients together. Only on rare occasions, if requested, will I meet with attorneys without their clients, or vice versa. Clients should participate in every part of the process because their livelihood is at stake. Moreover, a settlement reached with the clients' full involvement will more likely be implemented.

Time frames. There has been some debate about the length of settlement conferences. I allow two or three hours, as this seems to be sufficient for the vast majority of cases in federal court. The time is divided into several discrete stages:

1. introduction of the participants,
2. opening statement by the judge,
3. opening presentation by the plaintiff's counsel and the plaintiff,
4. opening presentation by the defendant's counsel and the defendant,
5. joint discussion with the judge,
6. separate caucuses between the judge and each party until a resolution or impasse is reached, and
7. concluding joint session to confirm settlement terms or to terminate the conference due to an impasse.

To complete the settlement conference within two or three hours, the parties must have previously exchanged their initial demands and offers in writing. Indeed, obtaining the initial demand and offer can be the most time-consuming part of the process. If the parties are unwilling to exchange written demands and offers before the conference, it generally means they do not have sufficient information to discuss settlement intelligently or they do not have authority to make a settlement proposal. In either case, conducting a conference where one or both parties have refused or were unable to exchange written settlement proposals beforehand would most likely be counterproductive and squander the court's and the participants' valuable time.

Authority to settle. Another key requirement for a successful settlement conference is the attendance of clients or client representatives who have the ultimate authority to settle the case. In my standing order, a person with such authority is defined as follows:

> An insured party shall appear by a representative of the insurer who is authorized to negotiate, and who has authority to settle the matter up to the limits of the opposing parties' existing settlement demand. An uninsured corporate party shall appear by a representative authorized to negotiate, and who has authority to settle the matter up to the amount of the opposing parties' existing settlement demand or offer. Having a client with authority available by telephone is not an acceptable alternative, except under the most extenuating circumstances. The purchase of an airplane ticket is not an extenuating circumstance. Because the Court generally sets aside at least two hours for each conference, it is impossible for a party who is not present to appreciate the process and the reasons which may justify a change in one's perspective toward settlement.

Before devoting time to the conference, judges must confirm that persons who can fully and finally settle the matter are present at the conference. If such clients do not believe that it is important enough to take the time to attend a conference, I frankly have grave doubts as to why I should participate.

Conducting the Conference

Introductions. After introducing myself, I ask the parties to introduce themselves and I jot down their names and titles on paper, creating a seating chart in my notes so I can identify each participant by name. I immediately confirm that the client or his or her representatives has the authority to settle the case without asking permission of others. Sometimes this is not possible. For example, in a situation where a public body is involved, I ask the representative whether he or she is a person whose recommendation is followed nearly all of the time. If so, this normally satisfies the opposing side. If the representative does not have the necessary authority, he or she is informed that the conference may be terminated to avoid wasting the other side's time. I may allow that represen-

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The author would like to express appreciation to Matthew O. Skoglund for assisting in the preparation of this article.

tative to make an immediate telephone call to obtain the necessary authority. In the absence of full authority, I may impose sanctions against that party for the attorney's fees and other costs incurred by the opposing party. Assuming the parties are represented by persons with settlement authority, I begin my opening statement.

The opening statement. My opening remarks are addressed primarily to the clients because this is their day in court and they likely have not previously participated in a settlement conference. Even if they have participated in one, however, no two judges conduct a settlement conference in the same way. The opening statement lays out the advantages of settlement over litigation, sets forth my goals for the conference, and explains how the conference will proceed.

I first describe the role of the settlement conference in our legal system. I explain that if the case does not settle, the parties will receive a fair and just trial or other resolution before a judge or jury. I assure the parties that though the final decision will remain uncertain until the case is tried, the process and the result will be fair. Parties must understand that they can opt to proceed with litigation, so during negotiations they may consider the advantages and disadvantages of settlement as compared to further litigation. As a firm believer in the trial and jury system, I want to reinforce the concept that the parties will receive justice if they decide to litigate rather than settle.

Less than 5 percent of federal civil cases go to trial. I make clear to the clients that settlement is the norm in our current legal culture and trial occurs only in those rare instances where parties cannot reach agreement. Some clients are not aware of this. Unlike trials, conferences do not make for compelling television dramas or movies, and clients may well associate lawsuits solely with a trial. Thus clients should be educated that settlement is the accepted norm.

My next step is to explain the main advantages of settlement, what I refer to as "the seven Cs." (Magistrate Judge Steven D. Pepe, of the U.S. District Court for the Eastern District of Michigan, first expressed to me a "five C" concept at a mediation skills workshop, which I have modified and expanded.) Each one of the potential advantages discussed below should be explained as part of an opening statement.

1. *Client control over the outcome.* Most clients prefer to control their own decisions and destinies. In the litigation process, decisions are left to lawyers, judges, and juries. A settlement conference provides clients with the opportunity to control the outcome of the dispute through negotiations and discussions in which they are involved. This is an important concept for clients, who often feel bewildered by litigation. Encouraging clients to assume an active part in the decision-making process empowers them rather than allows them to play a passive role in litigation, where their lawyers will decide to implement the litigation strategy.
2. *Contain costs.* Litigation is expensive. Legal fees can be a major burden for clients. In addition, litigation creates an opportunity cost for clients, who are required to devote their time and attention to gathering documents, responding to interrogatories, attending depositions, consulting with counsel, and participating at trial. Settlement enables parties to eliminate these expenses and devote their time, money, and energy to their current business or occupation.
3. *Certainty of outcome.* Unlike appliance makers, lawyers do not give money-back guarantees when they undertake a case. The reason is quite simple: litigation has risks that make the outcome uncertain. This uncertainty continues as motions are decided, trials are conducted, and appeals are weighed. Furthermore, this uncertainty can last for years, from the time a case is filed until a final judgment is rendered. Settlement provides certainty as to the outcome, and this is desirable to most clients.
4. *Confidentiality.* Litigation is a public process. Less than complimentary facts or comments will likely be placed in the public record and presented at trial by both sides if the case continues. These statements are available to customers, employees, prospective employers, and the press. Settlement can either be public or private, depending upon the parties' agreement. If confidentiality is important to clients, it can be achieved through settlement. Confidentiality is a significant motivating factor for many parties in choosing to settle.
5. *Creativity.* Judges and juries are bound by established legal principles in rendering justice. These principles have been developed over years, and unless the case is in equity, judges do not have the ability to fashion creative resolutions. On the other hand, parties are free to be as creative as possible in fashioning a settlement of their dispute. For example, in a suit where an employee was terminated three months short of vesting in a pension, as part of the settlement the defendant retroactively placed the plaintiff on family medical leave for three months so that she could qualify for the pension. The plaintiff agreed not to seek reinstatement, and both sides came away satisfied.
6. *Continuing the relationship.* If a case proceeds through judgment and possible appeals, the parties will likely be angry with each other, and the chance for a continuing relationship will be small.

Conversely, if they settle, the parties may be able to preserve their relationship. For example, in a case involving a dispute over a patent, the parties agreed to a licensing arrangement that enabled the defendant to continue manufacturing its product.

7. *Closure*. Litigation can be an emotionally trying experience. Moreover, it generally requires parties to relive experiences and situations they might rather forget. Cases addressing adverse employment actions, such as claims for wrongful discharge or discrimination, represent situations that parties would prefer to put behind them. These situations will generally be recounted in depositions, motions for summary judgment and at trial. A settlement provides closure and gives the parties an opportunity to look forward, not backward.

Making the goals clear in the opening statement. After explaining the advantages, I ask clients if they have any questions. We then move on to my three goals for the settlement conference. The first of these is to achieve an agreeable settlement for all parties. I ask each party whether it shares this goal. If both respond yes, I explain that they, as decision makers, have the power to make it happen. It is psychologically important that the parties themselves indicate a desire to settle. This may represent the first time that the desire for settlement has been mutually expressed. If they exhibit strong reservations, I ask them to explain. If a participant has made up his or her mind that he or she has no interest in settlement, I will likely terminate the settlement conference. This has happened very rarely and generally when the party was ordered to participate in the conference against his or her will.

Avoiding surprises is my second goal. I address the plaintiff: "I do not want you to come back to me six months or a year from now and say, 'Judge, I didn't realize I could go through a trial and end up with nothing.'" I then turn to the defendant and say: "And I do not want you to come back to me in six months or a year and say, 'Judge, I didn't realize that I could get hit with a big judgment and pay thousands in attorney's fees.'" The parties must understand the risks of litigation, the strengths and weaknesses of their cases, and what may happen if the case does not settle.

This can be accomplished in three ways. First, before the settlement conference, the attorneys are directed to exchange written settlement demands and offers and to share them with their clients. Second, a decision maker is required to be present for each party at the conference to see and hear what takes place. Being present is the only way to determine whether a change in the settlement position is warranted. Third, plaintiff's counsel and the plaintiff are given the opportunity to explain to the defendant's decision maker why he or she should seriously consider settling the case on the terms the plaintiff has put forth in his or her initial settlement demand. I ask the defendant to listen with an open mind because there are two sides to every case, and he or she will learn more about the case from the plaintiff's presentation. The defendant's representatives are requested not to interrupt during the plaintiff's presentation. After the plaintiff's side has completed its presentation, the defendant is given the same opportunity under the same rules. I request the parties to be courteous to one another.

I direct the attorneys and parties to address each other, not me, because I am not the decision maker at the conference. I function as a nonpartisan who facilitates communication between the parties as we consider and explore options for settlement. My checkbook will not be opened or put to use, nor can I order the parties to agree. The parties must persuade each other to alter their positions to achieve a settlement. By requiring the parties to direct their statements to each other, I am free to take notes and observe their reactions and body language.

I explain that the settlement conference is confidential. Nothing said can be referred to in a deposition or at trial. The parties need not erase what they learn, see, or hear, but if they wish to develop a matter factually, they must do so without referring to the conference. By describing the confidential nature of the proceedings, I encourage the parties to participate actively. Unlike a deposition or trial, where parties' responses are limited by the questions asked and the rules of evidence, the parties' involvement at a settlement conference is not constrained. This is sometimes a difficult concept for attorneys to grasp because they are used to being in total control. However, it is important for parties to understand the essential role they can play in bringing about a settlement.

My third goal is for the parties to develop a working relationship so that, if the case does not settle in two or three hours, the parties will settle over lunch and report back to me. In other words, I expect the momentum created at the conference to lead to a settlement later that day or in the near future.

I also inform the parties of a deadline by which the conference will be completed. Given the large volume of cases, judges do not have the luxury of endless days of discussion. Furthermore, a deadline keeps the court and the parties on task. A judge should generally be able to settle a case or determine within a couple of hours that it will not settle that day.

After explaining my three goals and confidentiality, I again ask if there are any questions.

The caucus process. Separate meetings with each party are where most of the negotiations take place. I use "shuttle diplomacy" to bring about settlement. After each side has presented its reasons why its settlement proposal should be accepted by the other side's decision maker and all lingering questions have been answered, I conclude the opening statement by explaining

the caucus process and its ground rules. While I meet with one side, the other party remains in the courtroom and prepares to negotiate. In the separate caucus, if a party wishes for me to transmit a new settlement proposal to the other side, I do so. If a party wishes for me to retain information in confidence, I honor that request. I remind the parties that because I am not the decision maker, they should not use the caucus to tell me what a great case or defense they have. For such information to possess value, they must share it during the joint session or communicate it through me to the other side. After explaining the caucus process, I offer one last opportunity for questions.

Despite all the topics covered, the opening statement generally takes no more than five to ten minutes. After completing it, we then work through the remaining phases of the conference, as described above.

Conclusion

A settlement conference is an important step in the litigation process. A judge can significantly contribute to the success of the conference by adopting a standing order that provides basic information about the process, requires parties to exchange written settlement proposals before the conference, and directs a representative with full settlement authority to attend.

A judge should demonstrate to the parties that he or she takes this process seriously, by setting aside sufficient time to explore settlement. The judge should also deliver an opening statement to the parties that explains the process, the advantages of settlement, and the court's goals, and reassures the parties that if they do not settle, they will receive justice through the court system. An effective opening statement enables the judge to develop a rapport with the parties and generate trust and confidence that will be helpful as the conference unfolds. The opening statement is extremely important for the clients and their counsel and should be given at the first session of every settlement conference.